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From :  
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Our Views on  
Constitutional matters in the Hong Kong Special Administrative Region and  
"Issues of principle and legislative process relating to constitutional  
development as laid down in the Basic Law" with respect to the selection of  
the Chief Executive and formation of the Legislative Council of the HKSAR

(I) Constitutional principles in the Hong Kong Special Administrative Region

(a) HKSAR : the power and government structure, the power of the Chief Executive and the executive bureaux, legislative power of the Legislative Council, the Executive Council and other public bodies

(i) The colonial nature of the government – policy-making and law-making powers of the Chief Executive, the Executive Authorities and the Legislative Council; the Executive Council.

The Chief Executive (CE) is invested with excessive power, absolute power in the HKSAR. That the CE has unchecked power (save for any intervention from the central authorities, which they have been refraining themselves from exercising in order to uphold the autonomy of the SAR) in all aspects in the running of the HKSAR is a remnant of the colonial years when the power of the Governor came from the Queen/King of England and when there was no separation of powers. The colonial Governor was a representative of the British monarch who has always had unchecked absolute power in Britain and the British colonies. Separation of powers in Britain is a lie. The Queen is Head of Parliament, the "fount of justice" and head of the executive and the government is Her Majesty's Government. Executive power is called Royal Prerogative in Britain. Indeed the Queen of England personifies statehood of the United Kingdom of Britain and Northern Ireland herself. Likewise in colonial Hong Kong there wasn't any separation of powers.

Sadly the same is happening in the HKSAR now - as spelt out in Article 48 of the Basic Law. All the holders of public office, principal officials and the Chief Justice as are selected (nominated, appointed and removed) by the Chief Executive. Britain allows at most 2 to 3 private member's bills tabled in Parliament each year, and since the executive constitutes the majority in Parliament, you can well be sure that without the approval of the executive, don't expect your bill can be tabled. The same was true in the colonial government, where only the Governor's appointees in the Legislative Council (LegCo) could table bills (Christine Loh Kung-wai and Anna Wu Hung-yuk) - they were appointed to write those bills! In essence they were the Governor's champions in the legislature. The colonial government was purely "executive-led", i.e. absolute power.

Article 48 gives the CE the power to "sign bills passed by the Legislative Council and to promulgate laws; ... (t) o sign budgets passed by the Legislative Council ... (t) o decide on government policies and to issue executive orders;..." This is absolute all-encompassing power! What about policy-making and the law-writing for implementing policies (other than by executive order)? Article 62 gives the Executive Authorities the power to "draft and introduce bills, motions and subordinate legislations;" but the Legislative Council has no role in formulating policies and writing laws. Any semblance of legislators making policies is lost. Gives a very bad perception!

The Executive Council (ExCo) is an irrelevant anachronism. As an "advisory body, the absolute power of the Chief Executive is again re-affirmed. (See below.) The system for appointment/selection of ExCo members (if they are not to be disbanded) as well as the principal officials under the "accountability system" introduced in 2002, and the heads of the quasi governmental "statutory bodies" must be revamped. The public must be able to participate in the nomination, ratification and dismissal processes and in the scrutiny of these bodies and persons.

What about the "collective responsibility" thing? This is a very British thing with the underlying principle "the Queen can do no wrong."

The Central Policy Unit should be disbanded. Is it another colonial anachronism functioning as a government-outside-the-government and/or a good-for-nothing-pork-barrel? Aren't there enough already? with the EOC, Ofta, Hospital Authority, Urban Renewal Authority, etc etc. These bodies are set up for the purpose to deny scrutiny by the LegCo.

The power structure of the HKSAR must be changed. The Chief Executive's power must be checked. The Legislative Council must be given more power - do not treat it as a mere consultative body. The role and power of the Executive Council and the various public bodies must be clarified. Procedure must be in place to scrutinise and check the powers of the various executive bodies - governmental, quasi-governmental, statutory or otherwise.

## (ii) Sovereignty

The Executive Council (ExCo) is a parallel to Britain's Privy Council, and the Chief Executive in Council parallels the Queen in Council in Britain. Why colonial Hong Kong had an Executive-led government says it all : Britain is run by the Queen/King and her/his agents, and the British Prime Minister and the Parliament have no real power because their so-called power comes from the British monarch, NOT from the people. This is how Hong Kong was run before the handover in 1997. Again this kind of political anomaly and government structure still holds though Mr Tung the Chief Executive's power was cut (executive intervention by the CPG) at last late last year. HKSAR remains in essence and in actuality a British colony and the Hong Kong judiciary regards the British courts higher courts to HKSAR courts. They abide by the British high courts and the House of Lords decisions blindly, regardless whether those decisions are moral or not. This very day legislator

James To Kun-sun said, "Hong Kong is a common law system (place)." This is wrong. The Basic Law is a Chinese national law and China practises civil law. Only that Article 8 of the Basic Law allows common law to be practised: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislations and customary law shall be maintained, except for any that contravenes this Law ..." To ignore the fact that our highest law is civil law demonstrates either a willingness to deny Chinese sovereignty, or an ignorance in the very nature of the Basic Law.

What is so superior about "common law"? The principle of "common law" is "the Queen is the fount of justice; the Queen can do no wrong". Senior judges, e.g. Law Lords in the House of Lords can make law at will, for example, by interpreting statutes beyond recognition of the original law and set precedents. Barristers/councils and judges are the same ilk. Basically, the Anglo-Saxon legal system.

HKSAR is practising "One Country, Two Systems". The Central Government has been reluctant to intervene in the HKSAR's affairs until late last year and only in the context of constitutional reform and only when there are huge differences on fundamental principles.

The Basic Law, which is Hong Kong's constitutional document, is a Chinese national law. Obviously, any constitutional reform must go through the National People's Congress/its Standing Committee. Why do the so-called democrats and barristers/QC's say that the NPC have no business in the Basic Law and Hong Kong's constitutional affairs? They love the Anglo-Saxon way of doing things.

The HKSAR government enjoys a high degree of autonomy. That does not mean that the Central People's Government have to rubber-stamp everything. Looking at how the HKSAR government, the Chief Justice and the legislature have been acting since 1997, they seem to be still thinking that we are under British colonial rule. They have forgotten that Hong Kong is a Special Administrative Region of China. The political arrangement and government structure discussed in previous paragraphs remains unchanged from the colonial years but now there is no imperial master; this gives the Chief Executive the power like he is given a blank cheque: he can do anything he wants to, and in reality he has been doing almost anything he wants to like an absolute despot. The CE is no different to colonial Governor, whose power came from another absolute despot - the British monarch. For over six years, everyone in the government and the ExCo had to follow the Chief Executive's orders. ("The Queen can do no wrong." The Chief Executive is acting like a pre-1997 Governor, who was a representative of the Queen.) But who did the Chief Executive listen to (and is still listening to), who did the Chief Executive obey (and is obeying)? He certainly listened to and obeyed someone (the Queen's deputy in Hong Kong) though never to the Central Government and the people of HKSAR.

Constitutional reform must look into:

- (i) sovereignty;
- (ii) power structure and checks & balance of power; and

- (iii) we must treat the Basic Law as what it is: HKSAR's constitutional document, and a Chinese national law (and the PRC is a civil law jurisdiction); hence consultation with civil law jurisdictions can be made should there be disagreements in its interpretation; and
- (iv) precedents of common law jurisdictions (which are all Anglo-Saxon states & ex-colonies) cases cannot be revered as sacrosanct, as what is being practised now; in fact, one might consider cases (not as precedents) determined in civil law jurisdictions such as France.

(II) Constitutional Development - the relevant principles & the legislative process

(a) Method for the Selection of the Chief Executive of the HKSAR

We can select the Chief Executive by

- (i) the Election Committee described in Item 2 of Annex I of the Basic Law, i.e. no change,
- (ii) indirect election through an 800-member Election Committee, whose members must vote according to the ballot result of voters in their constituency/category, and these constituencies are made up of all registered voters,
- (iii) universal suffrage (which does not mean democracy) in which all registered voters can vote directly.

If we adopt method (i) Election Committee or method (ii) indirect election, amending the election legislation will do. We don't need to amend Annex I of the Basic Law. But if we adopt method (iii) universal suffrage, we have to amend Annex I of the Basic Law to be followed by amendment to the local election legislation. Some qualified professionals – the Article 45/23 Concern Group, who think they alone can dictate what the Basic Law means and their interpretations are the only proper interpretations – argue that Item 7 of Annex I of the Basic Law gives the Legislative Council and Chief Executive power to amend the selection method of the Chief Executive and amend the selection method only without amending Annex I. But we cannot look at only one item in isolation wilfully omitting other items in Annex I of the Basic Law. On the method of selecting the Chief Executive, we have to consider the entire Annex I of the Basic Law before we can decide whether there is requirement to amend the Basic Law, at least Annex I of the Basic Law.

Item 2 of Annex I of the Basic Law says it in no ambiguous term that "(t)he Election Committee shall be composed of 800 members. Item 5 of Annex I of the Basic Law says "(t)he Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person-one-vote basis." To put it more simply, Items 2 & 5 of Annex I of the Basic Law dictate that we can only elect the Chief Executive through an 800-member Election Committee. And this method applies unless a procedure as stipulated in Item 7 is followed subsequent to 2007. The year 2007 cannot be "subsequent to" that year.

We cannot just amend Item 7 without amending or repealing other items in Annex I of the Basic Law if we want to elect the Chief Executive through

universal suffrage. Secondly, how to change Item 7? Delete the words "subsequent to"? or "they (the amendments) shall be reported to the Standing Committee of the National people's Congress for approval"? or the words "for approval" only? That's tantamount to independence.

(b) Relationship between the CPG and the HKSAR

In all states, the central authorities always have a final say on the region's policies and laws in the form of, for example, supreme court rulings or withholding of funds, etc. These regions cannot pass laws or amend their own constitutions that contravene with the state laws and constitution, nor can they make policies that conflict with those of the central authorities.

HKSAR enjoys a high degree of autonomy. That does not mean you can behave as if you are independent from the PRC ("The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." - Article 1 of the Basic Law, or can act in contravention to "the basic policies of the People's Republic of China regarding Hong Kong." (Preamble of the Basic Law) We must heed these principles.

The principle of "1 Country 2 Systems" can best be exemplified by Article 23 of the Basic Law. We can legislate on our own laws concerning national security. Our courts are separate from the Chinese Supreme Court. We are also not subject to most of the national laws. Why? Because of Article 31 of the Constitution of the People's Republic of China.

(Why is the general relationship between the central authorities and the regions, national & regional courts, not taught in our schools? Will the Education Commission people please answer.)

Do not forget that before July 1, 1997, the British had a Hong Kong minister from the House of Lords. Don't fool yourselves into believing that Her Majesty's Government did not have a sizeable control over you.

(c) Method for the Formation the Legislative Council of the HKSAR

As long as the Legislative Council is composed of 60 members, Item 3 of Annex II of the Basic Law gives the Legislative Council and Chief Executive power to amend the method of the formation of the Legislative Council. There is no need to amend Annex II of the Basic Law.

However, reform regarding the powers and limitations of the Legislative Council need amendment of the Basic Law. Community-wide consultation and consensus are needed. Talks with the NPC are also needed.

(d) Do we need to follow the procedures set out in Article 159 of the Basic Law

Yes, if we amend the method for selecting the Chief Executive as specified in Annex I of the Basic Law; and if we want to make other amendments, which are long-overdue;

No, if we amend the method for forming the Legislative Council as specified in Annex II of the Basic Law. That restricts to selection LegCo members only.

### Conclusion

From (I) Constitutional matters one can see we favour an overhaul of the power structure in the HKSAR. This requires amendments to the Basic Law, and cannot be done in one amendment. Merely changing the methods of selection of the Chief Executive and formation of the Legislative Council is in effect avoiding the problem. Yes we prefer universal suffrage, but without changing the system and institutions, we are in danger of ending up with a universally elected absolutely corrupt chief executive and a power thirsty legislature. This is NOT democracy as asserted by the *democrats*, barristers/QC's. Power structure has to change; election arrangements and methods are secondary to the power structure. Remember the old adage: "Power tends to corrupt, and absolute power corrupts absolutely." – Lord Acton.

We will discuss more constitutional matters, other principles & legislative process issues, and rule of law in later submissions. For example, phrases like "in light of the actual situation of HKSAR" in regard to constitutional reform. Article 23, Article 73, the judiciary and legal system of Hong Kong.

Prepared by

(1) (Signed)

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